No. 17,303

In the United States Court of Appeals for the Ninth Circuit

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF BREMERTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR THE UNITED STATES

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INDEX

CITATIONS

Cases:

Cases—Continued

Cases—Continued

Constitution and Statutes:

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OPINION BELOW

The district court's memorandum opinion and findings of fact and conclusions of law appear at pages 20 and 35 of the printed record.

JURISDICTION

This case involves an appeal from a declaratory judgment obtained by the United States. The district court had jurisdiction under 28 U.S.C. sec. 1345. Its judgment was filed on December 5, 1960 (R. 45). Notice of appeal was filed on February 3, 1961 (R. 48). The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether the appeal should be dismissed because:

a. Appellant has voluntarily conveyed all its interest in the subject matter of the case.

b. The Anti-Assignment Act forecloses prosecution of the appeal by appellant's grantee.

2. Whether the district court properly rejected the application of state law to the postal lease agreement entered into by the United States and appellant's predecessor in interest.

3. Whether the district court's finding and conclusion, supported by substantial evidence, that appellant had actual notice of the interest of the United States in the property under the agreement to lease and thereby acquired its interest subject to the interest of the United States can be set aside on the appeal.

4. Whether the district court correctly decreed specific performance of the agreement to lease, the terms of which are sufficiently definite and equitable.

STATUTES INVOLVED

The relevant portion of the Anti-Assignment Act, R.S. sec. 3477, as amended, 31 U.S.C. sec. 203, provides:

§ 203. Assignments of claims; set-off against assignee.

> All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the considera-

tion therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, except as hereinafter provided, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. * * *

* * * * *

The relevant portion of the Act of August 17, 1950, 64 Stat. 462, 39 U.S.C. sec. 794f, provides:

§ 794f. Leases, donations, and rewards.

In the performance of, and with respect to, the functions, powers, and duties vested in him, the Postmaster General may—

(1) enter into such leases of real property as may be necessary in the conduct of the affairs of the Department on such terms as he may deem appropriate, without regard to the provisions of any law, except those provisions of law specifically applicable to the Department * * *.

* * * * *

The relevant portion of the Act of July 22, 1954, 68 Stat. 523, 39 U.S.C. sec. 903, provides:

§ 903. Term-lease agreements for erection of buildings; acquisition and disposal of real property; use of rental funds.

(a) The Postmaster General is authorized to—

(1) negotiate and enter into lease agreements with any person, copartnership, corporation, or other public or private entity, which do not bind the Government for periods exceeding thirty years for each such lease agreement, on such terms as the Postmaster General deems to be in the best interests of the United States, for the erection by such lessor of such buildings and improvements for postal purposes as the Postmaster General deems appropriate, on lands sold, leased, or otherwise disposed of by the Postmaster General to, or otherwise acquired by, such person, copartnership, corporation, or public or private entity * * *.

* * * * *

The relevant portions of the Act of September 2, 1960, 74 Stat. 590, 39 U.S.C. (1958 ed.) Supp. II, secs. 2102 and 2103, provide:

§ 2102. Leases.

(a) Notwithstanding any other provision of law the Postmaster General may lease, on such terms as he deems appropriate, real property necessary in the conduct of the affairs of the Department.

* * * * *

(c) The Postmaster General may rent quarters for postal purposes without entering into a formal written contract where the amount of the rental does not exceed $1,000 per annum.

* * * * *

§ 2103. Additional leasing authority.

(a) In addition to the authority vested in him by section 2102 of this title the Postmaster General may—

(1) negotiate and enter into lease agreements which do not bind the Government for periods exceeding thirty years, on such terms as the Postmaster General deems to be in the best interests of the United States, for the erection by the lessor of the buildings and improvements for postal purposes as the Postmaster General deems appropriate, on lands sold, leased, or otherwise disposed of by the Postmaster General to, or otherwise acquired by, the lessor * * *.

* * * * *

STATEMENT

This action was instituted by the United States in December 1959 to obtain a judgment declarative of the legal rights and duties of the United States arising out of an agreement entitled "Proposal to Lease Quarters" and the Government's use and occupancy of the post office site at Winslow, Washington (now known as the Bainbridge Island Station of Seattle, Washington) (App. 35). Named as defendants were Earl L. Sands and wife; James E. Comrada and wife; Frederick D. Holbrook, trustee in bankruptcy of Mr. Comrada; and the First Federal Savings and Loan Association of Bremerton (hereinafter referred to as "First Federal" or appellant). The facts giving rise to the action may be summarized from the complaint and the "admitted

facts" recited in the district court's Pre-trial Order, and the trial as follows:

Desiring a post office building in Winslow, Washington, The Post Office Department invited bids (R. 64-65). In the "Proposal to Lease Quarters," dated June 25, 1955, as amended December 1, 1955, which was accepted by the Government on February 27, 1956, the Comradas agreed to construct the post office building according to specifications and to lease the property to the United States for a term of 15 years at an annual rental of $1,480.00, with one five-year renewal option at $1,320.00 a year (R. 5; App. 44).

On January 28, 1956, Mr. Comrada contracted with the Sands for the construction of the post office building "in accordance with postal specifications, as per plans furnished" (R. 5-6). Mr. Sands understood that the building to be constructed was for government use (R. 58). On May 23, 1956, the Comradas and the Sands entered into a contract superseding the earlier contract (R. 8, 56). The new contract provided for construction by Mr. Sands "of that certain post office building at Winslow, Washington" and expressly incorporated "the drawings, plans and specifications prepared by the United States Government" (R. 8). By the contract's terms, Mr. Comrada assigned all income from the property to Mr. Sands to be applied to the construction costs; Comrada agreed to give the Sands a statutory warranty deed; and the Sands agreed to reconvey to the Comradas upon payment of the construction costs and interest (R. 9). On that same date, Comrada conveyed the property to the Sands by statutory warranty deed (R. 6).

On July 25, 1956, the Sands obtained a loan of $21,000.00 from First Federal and as security executed a mortgage which covered the post office site and the adjoining parcel, known as the "restaurant property" (R. 6, 56). The amount of the loan represented the balance owing to First Federal on a 1954 loan to the Comradas, which was secured by a mortgage on the adjoining parcel, and $8,000.00 to finance the construction of the post office building (R. 6, 9-10, 103). The loan application recited that the money was to be used for "completing the above-described post office" (R. 10). Mr. Sands informed First Federal's assistant and loan secretary, Emily A. Sprague, that there was no lease of the property (R. 10, 56-57, 93). First Federal's president "knew that the building was being built for occupancy as a United States Post Office, and designated the building as a post office in his appraisal report" (R. 11). He personally made a physical inspection and appraisal of the parcels offered by the Sands as security for the loan, which inspection revealed a restaurant on the adjoining parcel and a "post office, 27 feet by 74 feet, which improvement was appraised at $16,453.00 (when completed)" (R. 10-11). No inquiry regarding a lease or lease agreement was made by First Federal to the Post Office Department or any person other than the Sands (R. 11). An employee of the title insurance company, which insured the mortgage for First Federal, "observed that the building under construction was to be used as a post office" (R. 11). In November 1956, First Federal declined to sign an agreement subordinating its mort-

gage to the Post Office Department's lease agreement (R. 11).

The Government went into possession of the premises on December 1, 1956, though construction had not been completed (R. 7). Construction was completed by the Government through competitive bids at a cost of $910.75 (App. 39-40). In the early part of 1958, Mr. Comrada was declared a bankrupt and Mr. Holbrook was appointed trustee in bankruptcy (App. 41). In November 1958, the Comradas executed a quitclaim deed to the Sands, which provided that rents due from the Government for the period prior to November 20, 1957, should be the property of the Sands (R. 7; App. 40-41).

On September 23, 1959, First Federal commenced a foreclosure action against the Sands, the Comradas, Mr. Holbrook, and the United States, in a state court, which action was removed to the district court on the Government's petition where the United States was dismissed as a party defendant on First Federal's motion (R. 7, 6, 94). A judgment of foreclosure was subsequently entered in that action (R. 6). The Sands then filed an action, Civil No. 4923, on September 30, 1959, in the district court, which was later consolidated for trial with the present case (R. 21). Civil No. 4923 as amended was against the United States, the Sands seeking damages in the amount of $9,999.99 for an alleged unlawful taking of property (R. 21). The Government then filed this declaratory judgment action on December 4, 1959, alleging, *inter alia,* that (1) its expenditures to complete the construction of the building in July 1957 had been necessitated by the refusal

of Mr. Sands and Mr. Comrada to finish the building; (2) both Mr. Sands and Mr. Comrada approved of the Government's procedure and agreed that the completion costs could be set off against rents due; (3) the Sands declined to execute a formal lease with the Government pursuant to the terms and conditions of the proposal to lease; and (4) both the Sands and First Federal had notice of the Government's interest (App. 39-41). The Government simultaneously deposited into the court registry the sum of $3,529.25, alleged to be the rent due (App. 40). On March 25, 1960, First Federal obtained title to the property at a foreclosure sale and demanded a monthly rental of $330.00 (R. 6-7, 94-95).

A three-day trial before the court was concluded on September 15, 1960. The testimony developed the above facts and the following: John L. Van Buskirk, the Regional Real Estate Manager of the Post Office Department, testified that the practice of the Post Office Department is to incorporate the terms and conditions contained in an unacknowledged proposal to lease in an acknowledged lease to be executed and recorded when the building is completed or when possession is assumed (R. 65-66, 69-70, 74). The sample lease on the reverse side of the proposal was said to specify monthly payments of rent (R. 75). Mr. Buskirk also stated that the Post Office Department pays rent many times pursuant to an accepted agreement to lease and that a local postmaster would have copies of documents relating to property under his control and is authorized to disclose the status of such property upon request (R. 80-82). The Post Office Depart-

ment knew of First Federal's mortgage at the time it went into possession (R. 84). Mr. Buskirk related that the annual rental for the Marysville postal facility in the area was $4,200.00 for 3,206 square feet; $6,800.00 for the Redmond facility (6,163 square feet); $3,816.00 for the East Stanwood facility (3,102 square feet); and $1,700.00 for the Darrington facility (1,793 square feet) (R. 143-144). The Winslow facility here involved was approximately 2,000 square feet and the annual rental for the 15-year term, as provided in the proposal to lease, was $1,480.00, with one five-year renewal option at $1,320.00 a year (R. 5, 11). Mr. Buskirk explained that (1) there are 15 postal regions in the nation; (2) there are approximately 2,000 post offices in the fifteenth region, which embraces the States of Washington, Oregon, Idaho, Montana, and Alaska; (3) 1,200 to 1,300 are rented quarters; (4) the normal, authorized procedure was followed in obtaining the Winslow facility; (5) the procedure is used in all 15 of the postal regions; and (6) over 300 facilities were obtained each year from 1953-1955, and approximately 600 each year from 1956-1959 under the "standard agreement to lease procedure" (R. 61-66).

Earl A. Wohlfrom, a postal inspector who retired in June 1957, explained that detailed information concerning the Government's interest in the property would be available to "interested parties" at the Post Office in Seattle, Washington (R. 85-88, 90-92). He did not believe a local postmaster would have complete information and for that reason would refer any inquiry to the postal inspection service (R. 87). Before construction began, Mr. Wohlfrom knew that Mr.

Comrada would need outside financing (R. 89-90). Otto Lippman owned five stores adjoining the post office site (R. 137). The main floor of one of his buildings rented for $275.00 monthly and the upper floor, a five-room apartment, rented for $125.00 monthly, both under a five-year lease (R. 137-138, 141). The rental on another building was the same for the last five years and the lessee had an option to renew for a five-year term (R. 140-141). Lessees of two other buidings had ten-year leases (R. 141).

Witnesses for First Federal were Emily A. Sprague, its assistant and loan secretary, and Arnold H. Burmaster, an appraiser. Mrs. Sprague claimed that First Federal had no knowledge as to whether the Government had an actual lease on the premises, and did not know whether it was subsequent to July 1956 that she learned of another post office in the area for which the Government did not have a lease (R. 96-97, 99, 101-102). A monthly rental of $158.00 was being received on the adjoining restaurant property which was admitted to be of the same quality construction as the post office building (R. 98-99). That monthly rental was said to reflect taxes, fire insurance, 6% interest on the loan, and miscellaneous upkeep and bookkeeping costs, with no return on capital (R. 100, 102). Mr. Burmaster believed a fair monthly rental value of the post office site to be $290.00 (R. 105, 116). He conceded that his appraisal had been made "recently," that he was not very well acquainted with Winslow rental values "until I came over to make this evaluation," and that his estimate was not based on rentals

as of December 1956 (R. 105, 128). This concluded First Federal's testimony.

Samuel J. Clarke (a realtor and builder), Charles L. Seavey (the Winslow postmaster who retired in July 1958), and Mr. Sands appeared as witnesses for the Sands. It was Mr. Clarke's opinion that a reasonable rental value as of December 1, 1956, was $330.00 (R. 129). In answer to a question relating to his having "had no previous experience appraising leasehold valuations," he said, "You might construe it that way" (R. 131). Mr. Seavey said that prior to May 23, 1956, he would not have been able to apprise anyone who asked of the express terms of the proposal to lease, but he would have been able to tell them of the existence of an agreement "to build, purchase and lease," and would have referred them to the postal inspector in Seattle, Washington (R. 132-134). Concluding their testimony, Mr. Sands opined that the reasonable monthly rental value was $333.00 as of December 1956, but he could not testify whether rental values had increased since that time though his view was that rental values had not decreased (R. 135-136).

In its Memorandum Opinion, filed on October 8, 1960, the district court stated that Mr. Holbrook withdrew from the action in consideration of the Sands' assignment of proceeds up to $1,400.00 (R. 21). The district court decided that federal law should govern the case, that the Government was under no legal duty to record the proposal to lease, that the proposal constituted an agreement to execute a lease in the future but was not a lease in itself, and that the Government thereby acquired an equitable right which was superior

to the Sands' and First Federal's rights since they acquired their interests with notice of the Government's equitable right (R. 23-28, 32). The terms of the agreement to lease were held to be sufficiently definite so as to permit specific performance (R. 30). The Government's completion costs were set off against the rents due (R. 33-34). Rents accruing after March 25, 1960, were held to be payable to First Federal or any subsequent owner (R. 34-35). The district court's findings of fact and conclusions of law were substantially in accord with the "admitted facts" of the pretrial order and its memorandum opinion, the district court expressly finding as follows (R. 40-42):

> 20. Earl L. Sands and First Federal Savings and Loan Association had actual notice of the proposal to lease quarters, the agreement between the government and the Comradas, and that therefore they did not have the status of a bona fide purchaser or a bona fide encumbrance. The actual notice consisted of implied or inquiry notice, that is, both Sands and First Federal Savings and Loan Association had knowledge of facts which would excite a prudent man to make further reasonable inquiry, and such an inquiry, if made, would have disclosed the interest which the government had in the subject property. Therefore both Sands and First Federal Savings and Loan Association are charged with having actual knowledge of the existence of the government's and Comrada's agreement to lease and they acquired their respective interests in the property subject to the interest of the United States.

21. Information concerning both the existence of the agreement to lease and the terms of the lease contemplated by the agreement to lease was reasonably available to any properly interested person and could have secured from either the postal inspector or the local postmaster and presumably from James E. Comrada. Had inquiry been made by Sands or First Federal Savings and Loan as to the particulars of any rental or lease arrangement existing with respect to the building, under construction, full information would have been forthcoming.

* * * * *

26. First Federal Savings and Loan did not perform their [sic] duty of making reasonable inquiry when they asked Sands if the government had a lease. Prudent banking practice demands more than accepting without further investigation a prospective borrower's statements as to the facts surrounding his security.

The Government was directed to prepare and to deliver a lease as to the Sands and First Federal pursuant to the proposal to lease, the lease to be executed and acknowledged by the parties or their successors in interest and recorded (R. 44). The Sands' action was dismissed with prejudice (R. 35). Judgment was thereafter entered and this appeal followed (R. 45, 48). Subsequent to the filing of its brief on appeal, First Federal announced the sale of its interest in the property to Joseph P. Mentor, Jr., who was reported to

have retained First Federal's counsel "to carry on on [in?] his behalf, the above-entitled law suit" (Report of Sale dated May 31, 1961, filed in this Court on June 6, 1961) (App. 50).

At the Government's request and pursuant to the report of sale, opposing counsel provided copies of "all papers in evidence of the transaction" (App. 50-56). One of the two papers is entitled "Assignment with Power to Carry On a Lawsuit" (App. 51). It recites that First Federal has "no further interest in and to said lawsuit and the appeal therefrom" and that First Federal (App. 52):

> does hereby sell, assign, transfer, set over and deliver unto the said Joseph P. Mentor, Jr., his executors, administrators and assigns all their right, title and interest in and to the above described lawsuit, and to any recovery that might be made therefrom * * *.

The instrument is acknowledged by First Federal to be its "free and voluntary act and deed" (App. 53). These instruments, together with the Complaint and the proposal to lease, are printed in the Appendix to this brief.

SUMMARY OF ARGUMENT

The appeal should be dismissed because appellant has voluntarily conveyed all its interest in the subject matter of the case, and because the Anti-Assignment Act, *supra,* precludes the prosecution of appellant's alleged claim against the United States by appellant's grantee.

But even on the merits, the district court's disposi-

tion should be upheld. Its rejection of the applicability of state law to the agreement to lease the building to the United States for use as a postal facility is well founded. Its finding and conclusion, that appellant had actual notice of the interest of the United States in the property under the agreement to lease and thereby acquired its interest subject to the interest of the United States, are supported by substantial evidence and should not be set aside on the appeal. Moreover, since the terms of the agreement to lease are sufficiently definite and equitable, the decree of specific performance is warranted.

ARGUMENT

I

The Appeal Should Be Dismissed

A. *First Federal lacks an interest in the subject matter of the appeal.*—It is settled law that a party to a lawsuit who has divested himself of the subject matter of the case may not maintain the appeal. In *Hamilton Trust Co.* v. *Cornucopia,* 223 Fed. 494 (C.A. 9, 1915), cert. den. 239 U.S. 641, this Court emphasized (at 499):

> It is a fundamental rule of appellate jurisdiction that every person desiring to appeal from a decree must be interested in the subject-matter of the litigation, and the interest must be immediate and pecuniary and not a remote consequence of the judgment. The interest must be substantial, and a merely nominal party to an action cannot appeal. The interest must also be subsisting, for although a party may have an appealable interest at the commencement of the suit, if that interest has termi-

> nated before the entry of the judgment or decree sought to be appealed from, he cannot appeal. Again, the right or title which the appellant seeks to establish must be his own and not that of a third person. * * *

The decision was the same in *DeKorwin* v. *First National Bank of Chicago,* 235 F.2d 156, 158-159 (C.A. 7, 1956), where the court relied on an earlier opinion, *In Re Michigan-Ohio Bldg. Corp.,* 117 F.2d 191-192 (C.A. 7, 1941):

> Generally accepted is the legal tenet that no one may appeal from a judgment unless he has an interest therein, direct, immediate, pecuniary and substantial. Speaking more specifically, a party has an appealable interest only when his property may be diminished, his burdens increased or his rights detrimentally affected by the order sought to be reviewed. [Citation omitted.] It follows that if his interest or right in and to the subject matter ceases pendente lite, by conveyance, assignment or otherwise, his appealable interest thereby expires, however prejudicial the judgment may be to another. [Citation omitted.] * * *

See also *Fulton Nat. Bank* v. *Gormley,* 99 F.2d 464, 465 (C.A. 5, 1938); *United Porto Rican Sugar Co.* v. *Saldana,* 80 F.2d 13, 14 (C.A. 1, 1935).

Here, the appellant, First Federal, has reported to the Court that it has conveyed all of its interest in the property which is the subject matter of the suit (App. 50). It admits its lack of interest and the assignment to Mr. Mentor provides that Mr. Mentor "shall in-

demnify and hold harmless First Federal * * * from any further expenditure or liability of any kind whatsoever * * *'' (App. 53). It follows that the appellant no longer has an appealable interest—its property is not diminished, its burdens are not increased, and its rights are not detrimentally affected. Consequently, First Federal's appeal should be dismissed.

B. *The appeal may not be prosecuted by First Federal's grantee.*—Ordinarily, the grantee of a party subject to a trial court judgment may be substituted on the appeal as appellant or appellee and the appellate court may direct substitution in its discretion on its own motion or on the grantee's motion. *McComb* v. *Row River Lumber Co.,* 177 F.2d 129, 130 (C.A. 9, 1949); *Sumpter Lumber Co.* v. *Sound Timber Co.,* 257 Fed. 408, 410 (C.A. 9, 1919); *United States* v. *Seigel,* 168 F.2d 143, 144-147 (C.A. D.C. 1948); *United Porto Rican Sugar Co.* v. *Saldana,* 80 F.2d 13, 14 (C.A. 1, 1935); *International Exchange Bank* v. *Pullo,* 285 Fed. 933, 934-935 (C.A. D.C. 1922); *F.A. Mfg. Co.* v. *Hayden & Clemons,* 273 Fed. 374, 378-379 (C.A. 1, 1921).

In this case, First Federal's grantee has not applied to the Court for substitution and may not prosecute First Federal's appeal because the Anti-Assignment Act, R.S. sec. 3477, as amended, 31 U.S.C. sec. 203, clearly proscribes the assignment of claims against the United States. That the assignment here attempts to transfer a claim against the United States is made manifest by the "Assignment with Power to Carry On a Lawsuit" (App. 51). In the district court, First Federal asserted a claim for an increased rental, and, in support thereof, offered testimony of what it be-

lieved to be a reasonable rental (R. 95, 105, 116). That claim was denied. After judgment and after filing its notice of appeal, First Federal conveyed all its interests in the property to Mr. Mentor and, in doing so, attempted to assign its purported claim to Mr. Mentor (App. 51). At all pertinent times, First Federal had simply a claim against the United States for an increased rental. That claim had not been allowed, the amount due if the claim had been allowed had not been ascertained, and no warrant had been issued. That the assignment involved here was not "made and executed in the presence of at least two attesting witnesses" cannot be denied (App. 53-54). Under the express language of the Anti-Assignment Act, *supra,* this voluntary assignment was therefore "absolutely null and void."

The Supreme Court has consistently held that such voluntary assignments are ineffective as against the United States and cannot be the basis of a judgment against the United States. *United States* v. *Shannon,* 342 U.S. 288, 291-294 (1952); *National Bank of Commerce* v. *Downie,* 218 U.S. 345 (1910); *Hager* v. *Swayne,* 149 U.S. 242 (1893); *Flint and Pere Marquette Railroad Co.* v. *United States,* 112 U.S. 762 (1885); *St. Paul Railroad* v. *United States,* 112 U.S. 733 (1885); *McKnight* v. *United States,* 98 U.S. 179 (1878); *United States* v. *Gillis,* 95 U.S. 407 (1877). Decisions which have established the principle that transfers by operation of law are not within the prohibition of the statute recognize that voluntary assignments are invalid. *United States* v. *Aetna Surety Co.,* 338 U.S. 366, 370-383 (1949); *Western Pacific Co.* v.

United States, 268 U.S. 271, 275-276 (1925); *Price* v. *Forrest,* 173 U.S. 410, 422-423 (1899); see also *Martin* v. *National Surety Co.,* 300 U.S. 588, 594-595 (1937); *Nutt* v. *Knut,* 200 U.S. 12, 19-20 (1906); *Ball* v. *Halsell,* 161 U.S. 72, 78-81 (1896); *Freedman's Saving Co.* v. *Shepherd,* 127 U.S. 494, 505-506 (1888); *Bailey* v. *United States,* 109 U.S. 432, 436-438 (1883); *Spofford* v. *Kirk,* 97 U.S. 484, 488-490 (1878). The only exceptions noted by the Supreme Court with respect to voluntary assignments of claims made to take effect before allowance are general assignments for the benefit of creditors, *Goodman* v. *Niblack,* 102 U.S. 556 (1880), and transfers by will, *Erwin* v. *United States,* 97 U.S. 392 (1878). See *United States* v. *Shannon,* 342 U.S. 288, 292 (1952).

There is no basis in the instant case for application of the exception relating to transfers by operation of law. This attempted voluntary assignment not constituting either of the only exceptions to the statute's proscription, the assignment must fall and the grantee denied prosecution of the appeal. As the Supreme Court declared, with reference to voluntary assignments, in *National Bank of Commerce* v. *Downie,* 218 U.S. 345, 356 (1910):

> They are clean-cut cases of a voluntary transfer of claims against the United States, before their allowance, in direct opposition to the statute. If any regard whatever is to be had to the intention of Congress, as manifested by its words—too clear, we think, to need construction—we must hold such a transfer to be absolutely null and void, and as

> not, in itself, passing to the appellants any interest, present or remote, legal or equitable, in the claims transferred. * * *

In *United States* v. *Gillis,* 95 U.S. 407 (1877), the Supreme Court rejected the argument that the Act applied only to claims asserted before the Treasury Department (in which the fiscal and accounting offices were then located) and not to suits in the Court of Claims, stating (at 413 and 416): "The words embrace every claim against the United States, however arising, of whatever nature it may be, and wherever and whenever presented," and the Act "is of universal application, and covers all claims against the United States in every tribunal in which they may be asserted."

It does not suffice to contend that double recovery against the United States is rendered impossible here and that the grantee should be allowed to pursue the appeal. Avoidance of possible double recovery is not the only purpose of the Act. Indeed, "its primary purpose was undoubtedly to prevent persons of influence from buying up claims against the United States, which might then be improperly urged upon officers of the Government." *United States* v. *Aetna Surety Co.,* 338 U.S. 366, 373 (1949). Other purposes are "to make unnecessary the investigation of alleged assignments, and to enable the Government to deal only with the original claimant," *United States* v. *Aetna Surety Co.,* 338 U.S. 366, 373 (1949); "that the government might not be harassed by multiplying the number of persons with whom it had to deal, and might always know with whom it was dealing until the contract was

completed and a settlement made," *Hobbs* v. *McLean,* 117 U.S. 567, 576 (1886); and "to protect the Government from traffic in claims against it," *Sherwood* v. *United States,* 112 F.2d 587, 592 (C.A. 2, 1940), rev'd on other grounds, 312 U.S. 584. Clearly, the instant case involves traffic in a claim against the United States and the Government is compelled to investigate the assignment. Allowance of the grantee's appeal would impel the United States to deal with one who is not the original claimant and the number of parties with whom the Government must deal would be multiplied.

Denial of the grantee's right to pursue the appeal may appear harsh. But the prohibition of the statute may not be avoided on equitable principles. In *Shannon,* the Supreme Court rejected "hardship" as a ground for subverting the Act and declined a proposal to balance the equities, stating that the proposal was one "which this Court has many times repudiated * * *." 342 U.S. at 294. Earlier, in *Downie,* it approvingly quoted *Spofford:* "It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments." 218 U.S. at 353; 97 U.S. at 488. Moreover, "[a]n equity can not grow out of an illegal and void transaction." *Hitchcock* v. *United States,* 27 C. Cls. 185, 206 (1892), aff'd *sub nom. Prairie State Bank* v. *United States,* 164 U.S. 227 (1896).

It is true that since the statute is for the protection of the Government, it will not be applied so as to produce inequitable results between assignor and assignee. *McKenzie* v. *Irving Trust Co.,* 323 U.S. 365 (1945); *Martin* v. *National Surety Co.,* 300 U.S. 588 (1937);

Lay v. *Lay,* 248 U.S. 24 (1918); *McGowan* v. *Parish,* 237 U.S. 285 (1915). In those cases, however, equitable principles were invoked in determining which party should receive money which the Government had paid or allowed, and the Government was not directly concerned with the result. Here, invocation of equitable principles would allow a suit against the United States by the assignee of an unliquidated claim. The result would be the emasculation of the statute, to the clear detriment of the United States. Further, " [a]ny ordinarily prudent person in purchasing property takes into consideration its condition at the time of the purchase. It is reasonable to assume that plaintiff did so." *Smith* v. *United States,* 96 C. Cls. 326, 342 (1942). In this case, it affirmatively appears that the grantee knew the status of his grantor's title as well as the interest of the United States (App. 41). And the Government had no part whatever in the transaction by which the claim against the United States was assigned. Thus, even if the statute did not preclude the granting of equitable relief, there is, in fact, no basis for such relief here. The conclusion is, we submit, inescapable that contrary to the terms and purposes of the statute, the grantee bought, and seeks to recover upon, his assignor's claim against the United States. Hence, the grantee should not be substituted for his grantor as appellant and the appeal should be dismissed.

II

The District Court Correctly Held Appellant to be Bound By the Agreement to Lease on the Merits of the Case

A. *The application of state law was properly rejected.*—In its memorandum opinion, the district court said (R. 23-24):

> As I announced at the commencement of the trial, Federal law and not Washington law should govern this suit. At this point I will briefly state my reasons for so holding. When the United States Government sets out to establish postal facilities, they are engaged in performing an essential governmental function as specifically empowered by the Constitution. Whenever the Government is engaged in such an activity which by its very nature will be carried on in all cities, towns and communities throughout all States of the Union, it is important that uniformity be achieved. To require that negotiations for securing postal facilities be conducted within the framework of each State's laws, which are admittedly varied and often contradictory, would impose an intolerable burden upon the Government. The respect which the Federal Government normally accords the laws of each individual state must give way in the interest of uniformity when the Government is performing a Constitutional function.

It is submitted that the district court's conclusion is eminently correct. Considerations similar to those relied upon by the district court were held by the Supreme

Court to require the application of a federal rule and the repudiation of state law to a situation involving the Government's contractural relations in *Clearfield Trust Co.* v. *United States,* 318 U.S. 363, 366-367 (1943). The factors deemed to be controlling were repeated by the Supreme Court one year later in *United States* v. *Allegheny County,* 322 U.S. 174, 182-183 (1944), in the statement:

> Every acquisition, holding, or disposition of property by the Federal Government depends upon proper exercise of a constitutional grant of power. In this case no contention is made that the contract with Mesta is not fully authorized by the congressional power to raise and support armies and by adequate congressional authorization to the contracting officers of the War Department. It must be accepted as an act of the Federal Government warranted by the Constitution and regular under statute.
>
> Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls. The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law

> of any State. [Citations omitted.] Federal statutes may declare liens in favor of the Government and establish their priority over subsequent purchasers or lienors irrespective of state recording acts. [Citations omitted.] * * *

And "where essential interests of the Federal Government are concerned, federal law rules unless Congress chooses to make state laws applicable." *United States* v. *93.970 Acres in Cook County,* 360 U.S. 328, 332-333 (1959). Of course the fact that Congress has not acted affirmatively on a specific question does not mean that state law will govern the decision. *United States* v. *Standard Oil Co.,* 332 U.S. 301, 309-311 (1947).

This principle has been recognized by this Court in several cases, including *United States* v. *Christensen,* 269 F.2d 624, 627 (1959), and *United States* v. *Matthews,* 244 F.2d 626, 628 (1957). In another case, after stating "that the *source* of the law governing the relations between the United States and the parties to the mortgage [FHA] is federal," this Court observed "that if the law of the State of Washington is to have any application in the foreclosure proceeding it is not because it applies of its own force, but because either the Congress, the FHA, or the Federal Court adopts the local rule to further federal policy," and that state law would not be selected even where merely permitted by Congress when a uniform federal rule is desirable. *United States* v. *View Crest Garden Apts., Inc.,* 268 F.2d 380, 382 (1959), cert. den. 361 U.S. 884 (emphasis by the Court). See also *American Houses* v. *Schneider,* 211 F.2d 881, 882-883 (C.A. 3, 1954). Even under the

Reclamation Act, where reference is made to state law for some purposes, "[a]s to the rights and duties of the United States under the contracts, these are matters of federal law on which this Court has final word." *Ivanhoe Irrig. Dist.* v. *McCracken,* 357 U.S. 275, 289 (1958).

Pertinent here is the fact that the Constitution provides that Congress shall have power to establish post offices. U.S. Const. Art. I, sec. 8. Pursuant to that power, Congress authorized the Postmaster General to "enter into such leases of real property as may be necessary in the conduct of the affairs of the Department on such terms as he may deem appropriate, without regard to the provisions of any law, except those provisions of law specifically applicable to the Department * * *." Act of August 17, 1950, 64 Stat. 462, 39 U.S.C. sec. 794f, *supra;* see also Act of July 22, 1954, 68 Stat. 523, 39 U.S.C. sec. 903, *supra;* Act of September 2, 1960, Pub. L. 86-682, 74 Stat. 590, 39 U.S.C. (1958 ed.) Supp. II, secs. 2102 and 2103, *supra.* The *source* of the law involved is thus clearly federal. There being agreement here that the Government followed its normal procedure and policy in entering into this proposal to lease and in view of the evidence of the number of postal regions and the use of the procedure and policy throughout the nation, the desirability of a uniform federal rule is patent (R. 61-66). More than half of the 2,000 post offices in the fifteenth region alone are under lease or month-to-month contract arrangement (R. 61-62). When a new facility of the type involved here is needed, the established procedure throughout the nation is the competitive bid

system (R. 64-66). Eight bids were received on the Winslow facility (R. 65). Following construction of the facility or when possession is obtained, a formal lease, in accordance with the terms and conditions of the agreement to lease, is executed (R. 60-70). The federal leasing program would be frustrated if a contractor can construct a building in accordance with an accepted bid and avoid the contract, before or after the federal agency assumes possession and before execution of a formal lease which is then recorded, by invoking a technical local law. Further, if such an accepted bid is a void, unenforceable contract under local law at its inception, the bid would appear to be subject to rejection as nonresponsive in a material respect. Hence, the Government's entire bid-and-award procurement program in the direct performance of an essential federal function would be jeopardized by the varying statutes of the several states.

In urging the adoption of state law here, appellant is contending for the defeat, rather than for the fulfillment, of the federal policy and procedure. That contention must be rejected. Congress has not adopted the local rule and has authorized the Postmaster General to act "without regard to the provisions of any law." Act of August 17, 1950, *supra*. Neither the Post Office Department nor the federal courts has selected state law, for that selection would not further federal policy and would preclude a uniform federal rule. Such a selection would manifestly introduce "disparities, confusions and conflicts," and would "result in substantially diversified treatment where uniformity is indicated as more appropriate, in

view of the nature of the subject matter and the specific issues affecting the Government's interest." *United States* v. *Allegheny County,* 322 U.S. 174, 183 (1944); *United States* v. *Standard Oil Co.,* 332 U.S. 301, 309 (1947). Obviously, "identical transactions [would be] subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain." *Clearfield Trust Co.* v. *United States,* 318 U.S. 363, 367 (1943). It follows that the district court properly rejected the peculiar state rule[1] and correctly concluded that the agreement to lease created an equitable right in the United States which could be specifically enforced against a subsequent purchaser or encumbrancer who acquires an interest with notice of that equitable interest.

B. *The district court's finding that First Federal was not a bona fide purchaser or encumbrancer is supported by substantial evidence.*—A purchaser is bound to use reasonable diligence and must make due inquiry. Failure to do so will deny him the protection afforded a bona fide purchaser. He is bound by actual as well as constructive notice. "He has no right to shut his eyes or his ears to the inlet of information, and then say he is a *bona fide* purchaser without notice." *Sim-*

[1] Some Washington State cases hold that an unacknowledged contract to execute a lease creates only a tenancy from month-to-month or from period-to-period when the rental is payable, and require a complete legal description of the property before specific performance will be ordered (R. 31; Br. 9). As will be discussed, this agreement was sufficiently definite to permit specific performance. Also, it is not certain that even under the state rule a periodic tenancy would result where, as here, an unacknowledged contract to lease is coupled with a contract to construct a building upon the premises.

mons Creek Coal Co. v. *Doran,* 142 U.S. 417, 437 (1892). It is realized that whether a purchaser has actual notice or knowledge is a question to be determined in each case "by its own peculiar circumstances," as discussed in the *Doran* case where the purchaser was held to have had "actual knowledge, or actual notice of such facts and circumstances, as by the exercise of due diligence would have led it to knowledge of complainant's rights, and that if this were not so, then its ignorance was the result of such gross and culpable negligence that it would be equally bound." 142 U.S. at 439-440. And the facts must, of course, be such as would ordinarily excite inquiry to the particular fact to be elicited. *United States* v. *Shelby Iron Co.,* 273 U.S. 571, 581 (1927). The general rule as to actual notice was phrased by the Supreme Court as follows (*The Lulu,* 10 Wall. 192, 202 (1869)):

> [K]nowledge of such facts and circumstances as are sufficient to put a party upon inquiry, and to show that if he had exercised due diligence he would have ascertained the truth of the case, is equivalent to actual notice of the matter in respect to which the inquiry ought to have been made.

See also *The Tompkins,* 13 F.2d 552, 554 (C.A. 2, 1926).

In this case, the district court found that First Federal had actual notice of the agreement to lease and consequently was not entitled to the status of a bona fide purchaser or encumbrancer (R. 40). That finding was supported by substantial evidence. The

Sands' loan application to First Federal recited that the money was to be used for "completing the above-described post office" (R. 10). First Federal's president "knew that the building was being built for occupancy as a United States Post Office, and designated the building as a post office in his appraisal report" (R. 11). His inspection of the premises disclosed a "post office, 27 feet by 74 feet, which improvement was appraised at $16,453.00 (when completed)" (R. 10-11). First Federal made no inquiry regarding a lease or lease agreement to the Post Office Department or any person other than the Sands (R. 11). An employee of the title insurance company, which insured the mortgage for First Federal, "observed that the building under construction was to be used as a post office" (R. 11). Inquiry to the postal inspector or the then local postmaster would have revealed the Government's interest and the detailed terms of the agreement to lease (R. 81-82, 85-88, 90-92).

It is submitted that First Federal could not shut its eyes and ears to the inlet of information then available to it and subsequently claim the status of a bona fide encumbrancer or purchaser. Under the facts, the exercise of due diligence would have led it to full knowledge of the Government's interest and its failure to obtain such knowledge was the result of its own negligence. Appellant's contention to the contrary is simply an attempt to have this Court reweigh the evidence and presents nothing for appellate review (Br. 18). The federal appellate courts do not retry facts and will not set aside findings supported by substantial evidence, which here consisted of "admitted

facts" and testimony at the trial. It is "the immemorial canon that, given substantial evidence to support its judgment, the trial court must have its way." *Coleman Co.* v. *Holly Mfg. Co.,* 269 F.2d 660, 661, 665 (C.A. 9, 1959). See also *Ellison* v. *Frank,* 245 F.2d 837, 839 (C.A. 9, 1957); *Lowe* v. *McDonald* 221 F.2d 228, 230 (C.A. 9, 1955); *Hycon Mfg. Co.* v. *H. Koch & Sons,* 219 F.2d 353, 355 (C.A. 9, 1955), cert. den. 349 U.S. 953; *Wittmayer* v. *United States,* 118 F.2d 808, 809-811 (C.A. 9, 1941).

C. *Specific performance of the agreement to lease is warranted.*—The district court's finding that the terms of the agreement to lease are sufficiently definite so as to permit specific performance is unquestioned by appellant (R. 41). In this phase of the case, appellant's entire argument is that the circumstances are such that a court of equity should not grant specific performance (Br. 22-27). The gravamen of that argument is that this Court should retry the facts and reweigh the evidence. As discussed above, that is not the function of the federal appellate courts. The granting of specific performance rests in the sound discretion of the district court and is determined by the particular circumstances of each case. *Nygard* v. *Dickinson,* 97 F.2d 53, 58 (C.A. 9, 1938); *Engelstad* v. *Dufresne,* 116 Fed. 582, 589-590 (C.A. 9, 1902).

Even so, a review of the facts will demonstrate the propriety of decreeing specific performance. Appellant concedes the absence of fraud (Br. 23). Its assertions on the appeal that the Government "knew that they were securing a rental * * * which is not enough to even pay the interest on the loan, pay the taxes,

insurance and upkeep, and does not even commence to amortize the loan''; and that the Post Office Department ''talked'' Mr. Comrada, now claimed to be ''ignorant of business'' and ''a poor business man,'' into the agreement to lease, as amended, are without foundation in the record (Br. 23). Nor does appellant cite any evidence of ''overkeenness'' in this case (Br. 25).

The question as to the reasonableness of the terms of the agreement was factual and the evidence conflicting. The trier of fact was not compelled as a matter of law to accept appellant's testimony of market rental value. Indeed, little weight could have been assigned to that testimony, since the appraisal on which the estimate was based had been made ''recently,'' appellant's appraiser, Mr. Burmaster, was not very well acquainted with local rental values ''until I came over to make this evaluation,'' and his estimate was not based on rentals as of the time the agreement was negotiated or even when the Government assumed possession in 1956 (R. 105, 128). Also, the terms of the agreement to lease constituted evidence to be considered on the question of reasonable market value. The Government itself proffered testimony relating to rentals of other postal facilities and other Winslow rentals (R. 137-141, 143-144). The fact that a long-term lease was involved was additional evidence to be considered. The Government's assumption of possession with knowledge of appellant's mortgage and refusal to subrogate the mortgage to the Government's interest formally is, we submit, irrelevant to the question (Br. 22-24). Furthermore, if the terms of the agreement to lease are unconscionable, as appellant

claims, it is curious that it would be successful in conveying its interest in the property to Mr. Mentor, the lessor of another postal facility, knowing that the district court had directed specific performance of the agreement (R. 114-115). Mr. Mentor is nowhere alleged to be "a poor business man" or "ignorant of business."

The terms of the agreement to lease are sufficiently definite and appellant had actual notice of the Government's interest. There is no question of fraud and the district court's findings are amply supported by evidence. The decree of specific performance is therefore proper.

CONCLUSION

For the foregoing reasons, it is submitted that the appeal should be dismissed. If the appeal is not dismissed, the judgment should be affirmed.

Respectfully,

RAMSEY CLARK,
Assistant Attorney General.

CHARLES P. MORIARTY,
United States Attorney,
Seattle 4, Washington.

JAMES F. MCATEER,
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ROGER P. MARQUIS;
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Attorneys,
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Washington 25, D. C.

AUGUST, 1961.

APPENDIX

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

No. 4959

UNITED STATES OF AMERICA, PLAINTIFF,

v.

EARL L. SANDS, a/k/a E. L. SANDS, and RITA SANDS, his wife; JAMES E. COMRADA and FLORENCE COMRADA, his wife; FREDERICK D. HOLBROOK, Trustee in Bankruptcy of James E. Comrada, and FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BREMERTON, DEFENDANTS.

COMPLAINT

COMES NOW the United States of America by and through Charles P. Moriarty, United States Attorney for the Western District of Washington, and James F. McAteer, Assistant United States Attorney for said District acting under the direction of the Attorney General of the United States and at the request of the Postmaster General, and for cause of action against the defendants, alleges as follows:

I

This is a suit of a civil nature brought by the United States of America, and jurisdiction therefor rests on 28 U.S.C.A. 1345. An actual controversy exists between plaintiff and the parties defendant and each of them, and plaintiff seeks a declaration of rights and other legal relations pursuant to 28 U.S.C.A. 2201.

II

The Postmaster General, hereinafter mentioned, is an agent of the plaintiff, United States of America, a

corporation sovereign and at all times and in all matters hereinafter mentioned, said Postmaster General, his officers and agents acted for and on behalf of the plaintiff, which was and is the real party in interest under and by virtue of Article 1, § 8 of theFederal Constitution and 39 U.S.C.A. 794f.

III

The defendants Earl L. Sands, a/k/a E. L. Sands, and his wife, Rita Sands, are and were at all times material to this complaint husband and wife and comprise a marital community under the laws of the State of Washington; that said defendant and his wife reside at Winslow, Washington in the Northern Division of the Western District of Washington.

IV

The defendants James E. Comrada and his wife, Florence Comrada, are and were at all times material to this complaint husband and wife and comprise a marital community under the laws of the State of Washington; that said defendant and his wife reside at Winslow, Washington in the Northern Division of the Western District of Washington.

V

That the defendant Frederick P. Holbrook is the duly appointed and acting Trustee in Bankruptcy for the Estate of James E. Comrada, bankrupt. Said Frederick P. Holbrook resides at Bellevue, Washington and maintains offices at Seattle, Washington in the Northern Division of the Western District of Washington.

VI

The defendant First Federal Savings and Loan Association of Bremerton is a federal savings and loan as-

sociation organized under the laws of the United States and doing business in the State of Washington, having its principal place of business in Bremerton, Washington in the Northern Division of the Western District of Washington.

VII

The defendants James E. Comrada and Florence Comrada, his wife, in a proposal to lease quarters, dated June 25, 1955, as amended December 1, 1955, and accepted by the Postmaster General on February 27, 1956, agreed to construct a post office building at Winslow, Washington (now known as Bainbridge Island Station of Seattle, Washington) according to certain specifications and to lease the property to the United States for a term of fifteen (15) years at an annual rental of $1,480.00 with one 5-year renewal option at $1,320.00 a year. A copy of said proposal to lease quarters, as amended and accepted, is attached hereto, marked Exhibit A, and by this reference made a part hereof as though fully set forth.

VIII

On January 28, 1956 a contract was entered into between the defendant James E. Comrada and the defendant Earl L. Sands, d/b/a Sands Construction Company, wherein the defendant Earl L. Sands agreed to construct the post office building at Winslow, Washington in accordance with the specifications contained in the proposal to lease quarters dated June 25, 1955 and accepted by the Postmaster General for a total price of $17,050.00. Thereupon the said defendant Sands commenced construction of said post office with his own funds, investing approximately $6,000.00 of his own funds on the construction. Thereafter it became known that the defendant Comrada was unable

to negotiate a loan to finance the construction of said post office.

IX

On May 23, 1956 the defendants James E. Comrada and Florence Comrada, his wife, conveyed by statutory warranty deed to the defendant E. L. Sands the real estate on which the aforementioned post office building was under construction. Said real estate is more particularly described as follows:

> That part of the Northwest quarter of the Southwest quarter, Section 26, Township 25, North, Range 2 E.W.M. described as follows:
> Beginning at the Southwest corner of the North one-half of the Southwest one-quarter of said Section 26; thence North 20 feet; thence East 718 and one-half feet to the point of beginning (sic) of the tract; thence West 29 feet to the point of beginning; and an EASEMENT appurtenant over the following described property which adjoins the above described property, being more accurately described as follows: Beginning at the Southwest corner of the Southwest corner of the North one-half of the Southwest one-quarter of said Section 26, thence North 20 feet, thence East 747 and one-half feet to the point of beginning; thence North 200 feet; thence 11 and one-half feet East; thence South 200 feet; thence West 11 and one-half feet to the point of beginning; situate in the County of Kitsap, State of Washington (hereinafter referred to as the post office site).

X

On July 25, 1956 the defendants E. L. Sands and Rita D. Sands, his wife, executed a mortgage on the post office site and another parcel of land to the defendant

First Federal Savings and Loan Association of Bremerton to secure a note of even date in the amount of $21,000.00. The purpose of said mortgage and note was to finance the construction of the building on the post office site. The defendant First Federal Savings and Loan Association of Bremerton had notice of the agreement to lease the building to be built on the post office site (Exhibit A, herein) at the time of the execution of said mortgage and took said mortgage subject to said agreement to lease.

XI

On December 1, 1956 the Post Office Department began occupancy of the building, notwithstanding the fact that the building was not fully completed. Said occupancy was with the express permission of the defendant Earl L. Sands which was communicated by letter dated October 30, 1956, a copy of which letter is attached hereto, marked Exhibit B and by this reference made a part hereof as though fully set forth.

XII

The defendant Sands was repeatedly asked to complete construction of the post office building, but such completion was not undertaken. Thereafter the Post Office Department advised both the defendant Earl L. Sands and the defendant James E. Comrada that the only alternative to completion of construction was to put the unfinished work out for public competitive bids and set off the cost thereof against the rentals due. This was done with complete approval of said defendants Sands and Comrada in July of 1957, at a cost of $716.55 (a copy of the accepted bid is attached to proposal to lease quarters, Exhibit A herein). In addition, miscellaneous other repairs to said premises were made and paid for by the Post Office Department in the

amount of $194.20, for a total cost to the Post Office Department of $910.75.

XIII

The plaintiff has occupied the post office premises at Winslow, Washington at all times since December 1, 1956. Under the terms of the proposal to lease quarters, as amended and accepted (Exhibit A herein), there is due and owing from the plaintiff as of December 1, 1959 for rent during such 3-year period the sum of $4,440.00 less the aforementioned cost of completion of construction and repairs in the amount of $910.75, making the amount of $3,529.25 due.

Pursuant to Rule 67, Federal Rules of Civil Procedure, and 28 U.S.C.A. 2041, plaintiff herewith deposits into the registry of the court said sum of $3,529.25.

XIV

The Post Office Department was advised that in the spring of 1957 the defendant Comrada unsuccessfully brought an action against the defendant Sands in the Superior Court of the State of Washington for Kitsap County (Cause No. 36332) for a reconveyance of title to the post office site and other property. In November, 1958 the defendants James E. Comrada and Florence Comrada executed a quit claim deed to E. L. Sands and Rita D. Sands covering the said post office site, which quit claim deed contains the following provision:

> "It Being Further Agreed between the parties hereto that whereas the United States Postal Department has occupied the building on the above-described property since December 1, 1956, that all rents due by said United States Postal Department for the period from December 1, 1956 to November 20, 1957, less the cost to them of finishing

the improvements thereon shall be the property of the grantors herein, and that all other rents due and owing shall be the property of the grantees herein."

A copy of said quit claim deed is attached hereto, marked Exhibit C, and by this reference made a part hereof as though fully set forth.

XV

In the early part of 1958 the defendant James E. Comrada was declared bankrupt. The defendant Frederick P. Holbrook, Trustee in Bankruptcy, asserts a claim against a portion of the rentals due from the plaintiff.

XVI

On or about September 23, 1959 the defendant First Federal Savings and Loan Association of Bremerton commenced an action seeking to foreclose the mortgage covering the post office site and another parcel of land. Said action on petition of the United States of America was removed and is now pending as Civil No. 4929, Western District of Washington, Northern Division.

XVII

The defendant Earl L. Sands has refused to execute a formal lease with the plaintiff according to the terms and conditions of the proposal to lease quarters, as amended, executed by the defendant James E. Comrada and his wife, Florence Comrada, and accepted by the Government. The defendant Sands has repeatedly refused to accept the back rentals in the amount specified in the agreement between the plaintiff and the defendant Comrada. The defendant Sands has had actual notice since January 28, 1956 and at all times herein, of the terms and condition of said agreement.

XVIII

Defendant Earl L. Sands claims that he is not bound by the plaintiff's contract with the Comradas and that he did not take title to the post office site in 1956 subject to the contract to lease. Defendant Sands and his wife, filed an action in this District on September 30, 1959 against the United States of America, the Postmaster General and the local Postmaster to regain possession of the post office site herein and to recover damages of more than $211,390.00 for alleged unlawful entry and wrongful detainer of possession. (Civil No. 4923, Western District of Washington.)

WHEREFORE, plaintiff prays for judgment and declaration

1. That Earl L. Sands had actual notice of and is bound by the terms and conditions of the proposal to lease quarters, as amended;

2. That the plaintiff's agreement with the Camradas constitutes a valid and enforceable lease of the premises under state and federal law;

3. That the First Federal Savings and Loan Association of Bremerton had notice of the agreement to lease, and took its mortgage from Sands subject thereto. If and when a foreclosure sale is had in the pending foreclosure proceeding (Civil No. 4929) the mortgagee or other purchaser at the foreclosure sale is entitled to receive from the plaintiff only the rental specified in the amended proposal to lease quarters. In the event that there is no foreclosure sale or that the Sands redeem the property, they are entitled to receive only such rental payments. (R.C.W. 6.24.210)

4. That the rental covering the 3-year period, December 1, 1956 to November 30, 1959, less the costs of improvements completed by the Government and repairs, deposited into the registry of the court should

be apportioned between Comrada's Trustee in Bankruptcy and Sands, according to the agreement in the quit claim deed (Exhibit C).

5. That Sands be required to enter into a formal lease with the United States substantial in accord with the terms and conditions of the proposal to lease quarters as amended.

6. And for such further relief, both legal and equitable, as to the court may seem proper.

CHARLES P. MORIARTY,
United States Attorney.

JAMES F. MCATEER,
Assistant United States Attorney.

Proposal to Lease Quarters

The Postmaster General June 25, 1955.
Washington 25, D. C.

The undersigned hereby agrees to lease the premises described below for a term of Ten (10) years from October 21, 1955, or date thereafter of completion of building or any contemplated improvements, additions, etc., but not later than 90 days after acceptance of this proposal by the Post Office Department, for the use of the post office at Winslow, Washington at a rental of Fifteen Hundred dollars (1,500.00) per annum, payable monthly and subject to the provisions of form 1400-a which is attached hereto, and which has been carefully read by the undersigned, except that —. First floor 26 feet 4 inches by 88 feet 8 inches, providing 2,335 sq. ft. net; Basement or cellar — feet — inches by — feet — inches, providing — sq. ft. net; of the one story Cement block building known as — No. — Winslow Way; lot No. None, block No. None, on the North side of Winslow Way —, between Erickson Street and Madison Road; on the — corner of — Street and — Street, in, Winslow, Kitsap County, Washington.

Dimensions and location of any additional spaces or adjoining ground areas which proponent agrees to provide:

An asphalt-paved driveway 14′ wide on east side of building from Winslow Way, extending to an asphalt-paved area at rear of building, 41′ wide by 50′ deep, adjacent to a concrete loading apron 10′ deep by 27′ wide at rear of building, for vehicle access, maneuvering and parking.

I further agree, in consideration of the rental hereinbefore specified:

(a) ~~To furnish satisfactory fuel, heat, light, water, power and sewerage service;~~

(b) ~~To furnish the boxes, fixtures, furniture and safe as listed on Form 1425;~~

(Show whether new, second-hand, equipment as now installed or other appropriate wording.)

(c) To furnish the specified toilet facilities, plumbing, heating, and lighting fixtures on ~~Form 1425-A:~~ per attached addendum.

(d) To provide the necessary gas, electric, and water meters;

(e) To equip the premises in accordance with the building requirements as listed on Form ~~1425-A:~~ per attached addendum.

(f) To furnish —

(g) To furnish —

and to keep the premises, and all items listed above in paragraphs (b) to (g), inclusive in good repair and proper condition, to the satisfaction of the Post Office Department during its occupancy of the premises.

I will have the room or rooms ready for occupancy by the post office on the date specified above as the beginning of the proposed term of lease, provided notice of the acceptance of this proposal by the Post Office Department is promptly received.

SEE ATTACHED ADDENDUM

(SEAL.)

/s/ JAMES E. COMRADA,
(Signature of proponent in full)

/s/ FLORENCE E. COMRADA,
(Signature of wife or husband, if married; of officer; or member of firm)

——— ———,
(Signature of officer, or member of firm)

P. O. Box 144, Winslow, Washington.
(Address of proponent)

Proposal No. 4

(To be filled in by Inspector)

Note.—Wife or husband must join proponent, if married, in submitting proposal. If proponent is a municipality, fraternal order, bank, or other corporation, proposal must be signed by the officers authorized by law or by the by-laws of the organization to sign such instruments and must bear the impression of the proponent's seal.

The contractor, in performing the work required by this contract, shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor shall include in all subcontracts a provision imposing a like obligation on subcontractors.

Acceptance by the Government.

Accepted subject to your letter dated December 1, 1955, reducing rental from $1500 per annum to $1480 per annum and increasing the lease term from 10 years to 15 years with one 5-year renewal option at $1320 per annum. All other terms and conditions to remain the same.

(Signed) Rollin D. Barnard,
Acting Assistant Postmaster General.

AUG. 16, 1955.

PAGE 2, FORM 1400 (or 4581)

ADDENDUM

1. Cancellation clauses (a) and (b), paragraph 10, of the standard form of lease used by the Post Office Department shall be eliminated from this contract.

2. This contract may, at the option of the Government, be renewed in periods of 3 years each for not exceeding 10 years additional, the rental for the first option to be $1,480 per annum and for the second option period $1,320 per annum with all other provisions of the formal lease remaining the same.

"In connection with the performance of work under this contract, the contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin. The aforesaid provision shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post hereafter in conspicuous places, available for employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of the non-discrimination clause."

"The contractor further agrees to insert the foregoing provision in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials."

(SEAL.) /s/ JAMES E. COMRADA,
(*Signature of proponent in full*).

/s/ FLORENCE E. COMRADA,
(*Signature of wife or husband, if married; of officer; or member of firm*).

——— ———,
(*Signature of officer, or member of firm*).

Dec. 1, 1955.

The Postmaster General,
Washington 25, D. C.

Reference is made to the proposal submitted by me on June 25 and accepted by the Government August 16, 1955, to lease quarters for the post office at Winslow, Washington, for a term of 10 years from date of completion of the building, at a rental of $1,500 per annum, no additional items included, with the Government having the option to renew in periods of 5 years each for not to exceed 10 years additional.

The provisions of that proposal are hereby amended to provide for a lease term of 15 years at a rental of $1,480 per annum, no additional items included, with the Government having the option to renew for one 5-year period at a rental of $1,320 per annum.

It is agreed that should additional floor and driveway space be required at the end of the first 10-year period of this contract, that I will provide same in the amounts determined to be needed by the Department at an annual rate of rental of $0.6338 per square foot for such additional floor space for the remaining 5 years of the base lease, with the rental on the option period to then be increased at the annual rate of $0.5655 per square foot for the additional space provided. In the event the building is enlarged the driveway area at the rear will be extended by a depth of not to exceed 50′.

It is further agreed and understood that all other provisions of my formal proposal are to remain the same.

/s/ James E. Comrada,
Signature of proponent.

/s/ Florence E. Comrada,
Signature of wife.

ACCEPTANCE BY THE GOVERNMENT.

——— ———,
Assistant Postmaster General.

ORMONDE A. KIEB,
By (Signed) Irving W. Thomas,
Director of Real Estate.

FEB. 27, 1956.

Your proposal dated June 25, 1955 and acepted by the Government August 16, 1955, is hereby modified subject to your letter dated Dec. 1, 1955, reducing the rental from $1500 per annum to $1480 per annum and increasing the lease term from 10 years to 15 years with one 5-year renewal option at $1320 per annum. All other terms and conditions to remain the same.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17303

UNITED STATES OF AMERICA, APPELLEE,

vs.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BREMERTON, APPELLANT

REPORT OF SALE

COMES NOW, MARION GARLAND, attorney for the Appellant, First Federal Savings and Loan Association of Bremerton, in the above entitled action, and hereby reports to the Appellee, United States of America and to the above entitled court, that the Appellant has sold all its right, title and interest in and to the property, the subject matter of the above entitled law suit, to JOSEPH P. MENTOR, JR.,

That this atttorney has been retained by Joseph P. Mentor, to carry on on his behalf, the above entitled law suit.

That a copy of all papers in evidence of the transaction are in the office of this attorney and will be furnished to any interested party upon request.

DATED this 31st day of May, 1961.

/s/ MARION GARLAND,
Attorney for Appellant.

Copy mailed this day to James McAteer, Assistant Attorney General this 31st day of May, 1961.

ASSIGNMENT WITH POWER TO CARRY ON A LAWSUIT

WHEREAS First Federal Savings and Loan Association of Bremerton has agreed to sell unto Joseph P. Mentor, Jr., their Certificate of Sale on Real Estate to the following described real property, to-wit:

PARCEL 1. That portion of the Northwest Quarter of the southwest quarter of Section 26, Township 25 North, Range 2 East, W.M., described as follows:

Beginning at a point 673 feet and 3 inches east and 20 feet north of the southwest corner of said northwest quarter of the southwest quarter; thence east 45 feet 3 inches; thence north 150 feet; thence west 45 feet 3 inches; thence south 150 feet to the point of beginning; EXCEPT the south 8 feet conveyed to Town of Winslow by deed bearing auditor's file No. 672154; ALSO

PARCEL 2. That portion of the northwest quarter of the southwest quarter of Section 26, Township 25 North, Range 2 East, W.M., described as follows:

Beginning at the southwest corner of the north half of the southwest quarter of said Section 26; thence north 20 feet; thence east 718.5 feet to the true point of beginning; thence north 200 feet; thence east 29 feet; thence south 200 feet; thence west 29 feet to the point of beginning, TOGETHER WITH an easement to use for road or to build a road for right-of-way purposes and as a means of travel by foot or vehicle over and across the following described strip of land; all as more fully set out in deed bearing auditor's file No. 642238, records of Kitsap County, Washington

Beginning at the southeast corner of the above described tract; thence north 200 feet; thence east 11.5 feet; thence south 200 feet; thence west 11.5 feet to the point of beginning, EXCEPT the south 8 feet from all of Parcel "2" as conveyed to the Town of Winslow

by deed bearing auditor's file No. 672154. Situate in Kitsap County, Washington.

Said Certificate of Sale of Real Estate being that Certificate issued by the sheriff of Kitsap County in Cause No. 39153 in the Superior Court of the State of Washington for Kitsap County, and

WHEREAS there is pending at the present time a lawsuit entitled United States vs First Federal Savings and Loan Association of Bremerton, Cause No. 4959 in the District Court, Western District of Washington, Northern Division, and

WHEREAS said lawsuit has been appealed to the United States Court of Appeals for the Ninth Circuit, and

WHEREAS the First Federal Savings and Loan Association of Bremerton have no further interest in and to said lawsuit and appeal therefrom, and

WHEREAS it is the intent of the purchaser, Joseph P. Mentor, Jr., to carry on said lawsuit, now, therefore, consideration of Joseph P. Mentor, Jr., having purchased the full amount of the investment of First Federal Savings and Loan Association of Bremerton by Certificate of Sale of Real Estate above described, First Federal Savings and Loan Association of Bremerton does hereby sell, assign, transfer, set over and deliver unto the said Joseph P. Mentor, Jr., his executors, administrators and assigns all their right, title and interest in and to the above described lawsuit, and to any recovery that might be made therefrom, and do hereby constitute the said Joseph P. Mentor, Jr. as their attorney in their name, or otherwise, but entirely at his own costs, to take all legal measures which may be proper or necessary for the complete recovery and enjoyment of said assigned premises.

Said Joseph P. Mentor, Jr., in accepting said as-

signment, shall be entitled to all refund of bonds, recovery of costs, judgment, accrued rents, but shall be liable for all additional costs not already incurred, or any judgment that might go adverse to the interest of First Federal Savings and Loan Association or himself, and shall indemnify and hold harmless First Federal Savings and Loan Association of Bremerton from any further expenditure or liability of any kind whatsoever, and by accepting this assignment, does agree to these terms. He further agrees that in the event there is any excise tax payable because of the above described transactions, that he shall be liable therefor.

Dated this 5th day of April, 1961.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BREMERTON.
by: P. E. ROSENBARGER,
President.
E. A. SPRAGUE,
Assistant Secretary.

STATE OF WASHINGTON,
County of Kitsap, ss:

On this 5th day of April, 1961, before me personally appeared P. E. ROSENBARGER and E. A. SPRAGUE, to me known to be the President and Assistant Secretary of First Federal Savings and Loan Association of Bremerton, the corporation that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned and on oath stated that they were authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

~~Marion Garland, Jr.~~
Doris E. Johnson.

Notary Public in and for the State of Washington residing at Bremerton.

RESOLUTION

Be and it hereby is

RESOLVED, that WHEREAS this Association has decided to sell its rights in and to the property known as the post office of E. L. Sands, Loan #11719, and

WHEREAS in order to effectuate said sale it is necessary that an assignment of the Certificate of Sale of Real Estate be exceuted, and that an assignment of the present lawsuit pending in Federal Court entitled United States vs. First Federal Savings & Loan Association of Bremerton, and E. L. Sands; Federal Cause No. 4959, which case has been appealed to the Circuit Court of Appeals under Cause No. 4959, and

WHEREAS all assignments are to be made without recourse for the exact amount of monies invested therein by First Federal Savings & Loan Association of Bremerton, be and it hereby is

RESOLVED that P. E. Rosenbarger, President and E. A. Sprague Assistant Secretary, be and they hereby are authorized to sign any and all instruments necessary to effectuate the sale and assignment of the above described certificate and chose in action.

Dated this 5th day of April, 1961.

CERTIFICATE

Comes now DELOSS SEELEY and hereby certifies that he is the Secretary of First Federal Savings & Loan Association of Bremerton, and that the above Resolution is a true and correct copy of a Resolution passed by the Board of Directors on the 21st day of March, 1961, wherein a quorum was present and all present

voted in favor of said Resolution, and that there has been no further Resolutions or actions by the corporation modifying or in any way nullifying said action.

/s/ DELOSS SEELEY.

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